IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1465

RAYMOND K. PROCUNIER, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, *et al.*,

Appellants,

v.

ROBERT MARTINEZ and WAYNE EARLEY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES

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QUESTIONS PRESENTED

1. Whether the district court should have abstained from deciding one of the two federal constitutional questions presented and required appellees to institute proceedings in state court, and whether abstention should be ordered in the present posture of the case.

2. Whether the district court properly invalidated the mail censorship regulations involved in this case, and

whether the new regulations approved by the court's final order fully protect every legitimate interest of appellants.

3. Whether the district court properly invalidated appellants' absolute prohibition against use by attorneys of law student or paraprofessional investigators to interview prisoners on their behalf, and whether the new regulation approved by the court's final order, authorizing the use of investigators certified by the State Bar, fully protects every legitimate interest of appellants.

STATEMENT OF THE CASE

A. Further Proceedings in the Court Below

Following the decision from which this appeal was taken, the district court received proposed regulations from appellants and further evidence presented by appellees (A. 98-134). On July 20, 1973, the court gave final approval to the revised regulations submitted by appellants. Such regulations are set forth in the Supplement to Appendix at pp. 194-203. We submit that the final regulations, approved over appellees' objections (Supp. A. pp. 204-210), fully protect every legitimate interest of appellants.

B. Statement of Facts

Conspicuously missing from appellants' Statement is any mention of the factual record and evidence on which the decision of the district court was soundly premised. Accordingly, we here state the pertinent facts.

1. *Mail censorship*

The California mail censorship rules are expressly based on the premise that mail is a "privilege", not a

"right", which may be granted or withheld in the discretion of prison officials (A. 48, 64).

Prisoners confined in California institutions who desire to communicate by mail are required to submit letters to prison officials who censor them to determine whether they conform to certain rules (A. 19,28–Admission 1). The rules involved here are the following:

Director's Rule 2402(8) prohibits prisoners from writing letters that are, *inter alia*, "defamatory . . . or are otherwise inappropriate" (A. 19,28; Exhibit C to Appellants' Brief);

Director's Rule 1201 forbids prisoners from writing letters in which, *inter alia*, they "unduly complain" or "magnify grievances" (*Id.*); and

Director's Rule 1205(d) defines "contraband" to include "any writings . . . expressing inflammatory political, racial, religious, or other views or beliefs when not in the immediate possession of the originator . . ." Letters may constitute contraband writings within this rule (A. 19, 28–Admission 1).

Outgoing letters submitted for mailing by prisoners and incoming letters addressed to prisoners may be read by mailroom staff and by other employees of the prison (A. 19,29–Admission 2; A. 48-50). No criteria or standards, other than those contained in the rules set forth above, are furnished to the mailroom staff to guide them in deciding whether a particular letter violates any prison rule or policy (A. 19-20–Admission 2).

Letters found objectionable by the mailroom staff may be rejected for a variety of reasons. For example, at Folsom Prison the checklist used by staff to reject letters authorizes rejection for, *inter alia*, "criticizing policy, rules or officials" and "mentioning inmates by name or number or relating gossip or incidents"; and staff may also reject letters for reasons they deem appropriate

(A. 78-79, 50-51, 72-73). The checklist used at San Quentin also authorizes rejection of letters for a number of reasons, including "not proper correspondence" and "prison gossip" (A. 67, 51). The checklist used at the institution at Vacaville specifies a number of other reasons for rejecting correspondence, including "offensive language" (A. 52; exhibit 4 to Procunier dep.; Supp. A. 190). Appellant Procunier testified that rejecting letters for these reasons is permissible under the Director's Rules set forth above (A. 50-52).

Given the absence of standards for guiding mailroom staff, and the broad and vague reasons deemed permissible for rejecting letters, it is not surprising that prison officers frequently reject letters that criticize them or express opinions they disagree with. Thus, the mailroom sergeant at Folsom Prison will reject letters as "defamatory" (within the meaning of Director's Rule 2402(8)), if they are

> "belittling staff or our judicial system or anything connected with the Department of Corrections" (A. 75).

Letters will be prohibited for "magnifying grievances" (within the meaning of Director's Rule 1201), if they are "belittling the staff because of their incompetency" (A. 75). Another official has rejected numerous letters on the ground that they contain "disrespectful comments," or "misrepresenting of facts," or "derogatory remarks," or material that is "discriminatory or derogatory toward any individuals or races," or "referring to the different employees at the institution and making allegations and stating mistruths and so forth," or "erroneous information," or what the official thinks is "misinformation" about the prison or "prison gossip" (A. 91,92,81-86, and

exhibits 1-8 to Morphis dep.).[1] The same criteria govern censorship of both outgoing and incoming letters (A. 86).

When a prison employee[2] decides that a letter constitutes improper correspondence, he is authorized to take the following actions, alone or in combination:

(a) refuse to mail the letter and return it to the prisoner;

(b) submit a disciplinary report which may lead to suspension of the prisoner's mail privileges as specifically authorized by Director's Rule D2401 or to more severe disciplinary punishment up to and including confinement in segregation;[3]

(c) photocopy the letter and place it or a summary of its contents in the prisoner's permanent file (A. 20,29–Admission 5; A. 59-61).[4]

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[1] The letters rejected are in evidence and are innocuous by any standard. They are mostly letters to mothers, fathers or other relatives complaining of treatment the prisoners have allegedly received. The official rejected a letter as stating "misinformation" even though he knew that the statements he objected to were direct quotations from a published newspaper article, explaining the prisoner's reasons for withholding his consent to an "aversion therapy" program (A. 85 and exhibits 4 and 5 to Morphis dep.).

[2] Censorship is done by guards assigned to mailroom duty, their civilian helpers, members of the night watch or the officer in charge of a lock-up unit (A. 29, 59, 73-74, 81).

[3] See A. 77; Supp. A. 170; A. 24, 45–Admission 24; Supp. A. 172; A. 24-25, 43–Admission 28. The severity of disciplinary punishments in California prisons is comprehensively described in *Clutchette v. Procunier*, 328 F.Supp. 767 (N.D. Cal. 1971).

[4] Placed in plaintiff Martinez's file, for unexplained reasons, were copies of letters to a relative and to a federal judge (A. 59-60; exhibits 5 and 6 to Procunier dep.).

Letters may be placed in a prisoner's file even if they do not violate any rule, if mailroom staff believe that the letters "reveal an inappropriate attitude toward prison staff or society or express radical political views" (A. 21,29–Admission 7). Letters placed in a prisoner's file are referred to and consulted by prison classification committees which determine the prisoner's housing and work assignments (A. 21,29–Admission 8). Such letters are also available to the California Adult Authority which decides whether and when to grant parole (A. 21, 29–Admission 9; A. 60).[5]

There is no effective procedure by which a prisoner may challenge a guard's censorship decision. Although appellants say that the prisoner can "appeal" (A. 20, 29–Admission 6), there is no Director's Rule establishing any such procedure; prisoners are not informed of the possibility of appeal; there is no hearing of any kind and there is no provision for review by anyone other than the censor.[6] Regarding incoming letters rejected by staff, there is not even a provision for notice to the prisoner that the letter had been received at the prison and rejected.

Despite the obvious deficiencies and invitations for abuse contained in their rules, appellants offered no evidence whatever, not even their opinion, to show that

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[5] Indeed, Director's Rule 1205(f) specifically authorizes the retention of "contraband" writings, which may include letters, for referral to the Adult Authority (A. 21, 30–Admission 10; Supp. A. 172; A. 24-25, 43–Admission 28).

[6] Three different officials described three completely different and inconsistent procedures to use in seeking review of a mail decision (A. 58-59, 76, 87), but one candidly admitted that there is "no established policy" (Miranda dep. p. 24). Appellants keep no records regarding rejected letters (A. 34-35).

there is a legitimate need for such rules, that danger to prison security might result without them or that the rules were reasonable or necessary to promote the orderly functioning of the prisons. The court below expressly found that the rules were not "reasonable and necessary", were "without any apparent justification" or any "conceivable justification on the grounds of prison security" and "would not appear necessary to further *any* of these functions [of prisons in America]." 354 F.Supp. at 1096 (emphasis by the court).

In response to the decision of the district court, appellants developed and submitted new censorship rules. The rules proposed by appellants and given final approval by the district court (Supp. A. 211-212) continue to regulate the content of prisoner mail, but with considerably more specificity. The approved rules also include a simple procedure for administrative appeals of lower-level censorship decisions (Supp. A. 197-198). Appellants have suggested no reasons, either here or in the district court, why the court-approved regulations do not protect every legitimate state interest.

2. Law student and paraprofessional investigators for attorneys

The Mail and Visiting Manual Section MV-IV-02, promulgated by appellant Procunier, authorizes personal interviews of prisoners by their attorneys of record or the designated representative of the attorney of record (A. 22,30—Admission 17). However, the designated representative of an attorney must be either a member of the California Bar or an investigator licensed by the State of California (*Id.*). Interviews by law students or paraprofessional assistants to attorneys are prohibited (*Id.*).

This rule bars interviews regardless of the qualifications or identity of the student or assistant, the attorney

or the prisoner to be interviewed, and regardless of the type of case, the need to use an investigator or any other possibly relevant factor. Thus, in this very case, counsel for appellees, who was requested by the district court to investigate and to consider undertaking an uncompensated appointment in this case, requested permission to have a supervised law student interview plaintiff Martinez for the purpose of investigating and preparing the case (Supp. A. 184-186, 177-182). Permission was denied by prison officials solely on the ground that no such interviews are permitted under their rule (*Id.*).

Appellants' rule prohibiting interviews by law students and other supervised paraprofessionals works a substantial inconvenience to attorneys representing prisoners or considering whether to represent prisoners (Supp. A. 184-188). Because of the remoteness of most California institutions, personal visits by attorneys are necessarily rare and very inconvenient (*Id.*). Indeed, such visits are so time-consuming and inconvenient that, as the court below found, attorneys are generally reluctant to make such visits, and this may mean that they decide not to provide any representation. 354 F.Supp. at 1098. This is especially true where the prisoners are indigent, as most are, and cannot pay for the attorney's expenses or time in making personal visits. Of course, indigent prisoners are financially unable not only to retain paid counsel but also to hire licensed investigators, the only paraprofessionals appellants permit to interview prisoners. There is a growing number of highly qualified and academically trained legal paraprofessionals who are completely barred by appellants' rule from acting as investigators for lawyers representing prisoners (A. 127-130).

Although appellants prohibit law students assisting attorneys from interviewing prisoners, they permit a large number of law students in their institutions on a regular basis. There are law student programs at most if not all California prisons (A. 61, 113-115, 116). Law students,

with only the minimal supervision of a faculty member, are permitted to interview prisoners and assist them on legal matters (*Id.*; Supp. A. 188; A. 35-39). The prison officials make no inquiry into the qualifications of law students in these programs, and make no security check on them (*Id.*; A. 62).

In response to the decision of the court below, appellants developed and submitted a new investigator rule. Under the new rule proposed by appellants and approved by the court below, law students and legal paraprofessionals certified by the State Bar of California may serve as investigators for attorneys (Supp. A. 198-200). Appellants' Brief, filed well after the final order of the district court, inexplicably asserts that the class of authorized investigators is much broader (pp. 24-27). This is just untrue. Indeed, since at present there is *no* procedure for State Bar certification of paraprofessionals,[7] the only addition to the former rule consists of State Bar certified law students. Even these students are subject to far more stringent precautions than those applicable to non-certified law student programs already authorized by appellants (compare Supp. A. 198-200 with A. 113-114). Appellants have not suggested, either here or in the district court, any reason why allowing lawyers to utilize the services of State Bar certified law students would interfere with any legitimate state interest.

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[7] As pointed out in n. 35, *infra*, the State Bar has strongly recommended legislation authorizing certification, to utilize the services that can be provided by qualified paralegal personnel. But since there is no such procedure presently in effect, appellants' new rule will not immediately result in any use of paraprofessional investigators Under the State Bar's existing Rules Governing the Practical Training of Law Students, certified students are permitted to perform a wide range of functions in the investigation, preparation and presentation of legal matters under the supervision of attorneys. See State Bar of California *Reports* (Feb. 1970).

SUMMARY OF ARGUMENT

I.

The district court did not err in declining to abstain from deciding one of the two federal constitutional questions presented—the constitutionality of the mail censorship regulations. Neither of the arguments that appellants now urge for abstention was presented to the court below. In these circumstances, appellants cannot now claim that the district court abused its equitable discretion by proceeding to decide the constitutional question presented.

Moreover, abstention is not required simply because the regulations were invalidated, in part, on the ground of vagueness. This Court has repeatedly held that abstention is not proper in such circumstances. Here, there is no unsettled issue of state law whose resolution could eliminate the federal question. Nor have appellants suggested any construction of the regulations that could conceivably cure their vagueness. And, in any event, the challenge here is not limited to vagueness. Further, there is no state statute that is fairly subject to a construction that would avoid or modify the constitutional question.

Finally, there is no clearly available and adequate state remedy in California that could have justified the federal court's abstaining and thus forcing appellees to repair to the state courts. California habeas corpus is the only state prisoner remedy, and it would not be effective to protect the rights involved here. Requiring appellees to institute state proceedings would only have caused delay, expense and frustration, and the federal constitutional question would not have been eliminated.

Even if abstention might have been appropriate as an initial matter in the district court—assuming the proper

grounds had been timely raised by appellants–abstention should not be ordered in the present posture of the case. Everything the abstention doctrine is designed to postpone–premature federal proceedings involving state officials–has already occurred here without specific objection by appellants. And since appellants have not contended that the new regulations submitted by them and given final approval by the court below fail to protect any of their legitimate interests, it would make no sense to order the district court to abstain now.

II.

The district court properly invalidated appellants' former mail censorship regulations. There is no contention in this case that prison officials may not inspect and read prisoner mail. The issue concerning the constitutionality of regulations under which guards censor and punish prisoners for the content of their letters–the words they use–was properly resolved by the court below. The only provisions invalidated prohibited prisoners from writing letters in which they "unduly complain," or "magnify grievances" or express certain "views or beliefs" or which are deemed "defamatory" or "otherwise inappropriate." These provisions are not needed to serve any legitimate penal interest. Recognizing that prisoners' First Amendment rights may be curtailed because of their restrictive environment, and keeping in mind legitimate penal interests, the rules here are nevertheless invalid because (1) they are overbroad in that they prohibit lawful and protected expression; (2) they are unduly vague, with the result that standardless and discriminatory enforcement is encouraged; (3) they fail to give fair notice of conduct that may be severely punished; and (4) thay lack procedural safeguards against

suppression of protected speech through error or arbitrariness. A principal use of the rules has been to suppress criticism of prison guards and their policies, regardless of whether such criticism is valid.

The record is barren of any justification for the rules in question, and the district court properly found, on the evidence presented, that no legitimate penal consideration supported them. Furthermore, responsible correctional authorities throughout the nation now reject mail censorship of the kind involved here as unsound correctional practice. The authorities find such censorship unnecessary and counterproductive. The only real controversy among the authorities today is whether prisoner mail should be read at all, not what contents should be censored or punished, and that is not an issue that the Court must now resolve.

Finally, showing more than ample deference to appellants, the district court gave final approval to new regulations developed and submitted by appellants. These regulations fully protect every legitimate state interest.

III.

The district court properly invalidated appellants' former absolute prohibition against use by attorneys of law student or paralegal investigators to interview prisoners. Appellants voluntarily began permitting State Bar certified law students to perform this function. The only requirement added by the district court was to include State Bar certified paralegal assistants; but since there is presently no such paralegal certification, appellants have not yet been required to do anything they are not already doing voluntarily.

The decisions of this Court have firmly established the principle that prisoners have a due process right of

effective access to the courts for the purpose of setting aside invalid convictions or remedying invasions of their constitutional rights while incarcerated. But appellants' former rule barred all law student and paralegal assistants to attorneys regardless of their qualifications and regardless of the need to use them in order to provide legal assistance to indigent prisoners. This results in denial of effective access to the courts for such prisoners. The California Bar and the American Bar Association have strongly recommended the use of law students and paralegals to assist in providing legal services to those otherwise unable to obtain them. If use of such persons is merely desirable as a general matter, it is absolutely essential if indigent prison inmates are to receive vital assistance in obtaining access to the judicial process.

Appellants here were unable to show any countervailing state interest to justify their rule impeding indigent prisoners' due process right of effective access to the judicial process. Yet the burden of justifying the exclusion of trained and supervised assistants to lawyers should be greater than the burden of justifying restrictions on "jailhouse lawyers," which this Court struck down in *Johnson v. Avery*, 393 U.S. 483 (1969). Here, the district court gave more than adequate deference to any legitimate interest of appellants. The new regulation developed and submitted by appellants, which was given final approval by the court below, fully protects every legitimate state interest.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN DECLINING TO ABSTAIN FROM DECIDING ONE OF THE TWO FEDERAL CONSTITUTIONAL QUESTIONS PRESENTED, AND ABSTENTION SHOULD NOT BE ORDERED NOW.

Appellants contend that the district court should have abstained from deciding one of the two federal constitutional questions–the constitutionality of the mail censorship regulations (Appellants' Brief, p. 5). Appellants do not suggest that the court should have abstained from deciding the other half of the case, dealing with denial of access to investigators for attorneys. Appellants argue that the court should have required appellees to repair to the state courts to institute proceedings on the first issue because (1) the mail regulations were challenged, in part, on the ground of vagueness, and (2) a construction of California Penal Code §2600(4) might have avoided or modified the federal constitutional question. Neither of these contentions was presented to the court below. We submit that the court below was not required initially to abstain and that, in any event, abstention should not be ordered now.

A. The District Court Was Not Required Initially To Abstain.

As noted above, neither of the specific arguments now urged for abstention was made in the district court. Appellants' failure to raise these points below ought to bar them from belatedly claiming that the court should have abstained. *Cf. Brown v. Chote*, 411 U.S. 452 (1973); *Tacon v. Arizona*, 410 U.S. 351 (1973); *Jones v. United States*, 357 U.S. 493, 499-500 (1958), indicating that

such tactics are not favored by this Court. Since abstention "involves a discretionary exercise of a [federal] court's equity powers," *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964), and since appellants did not ask the court below to exercise its discretion on the grounds now urged,[8] they cannot now claim that the court abused its equitable discretion by proceeding to decide the federal constitutional question presented.

Even if appellants did not waive their abstention arguments by failing to present them seasonably below, the new arguments are without merit and inconsistent with recent precedents in this Court.

1. *Abstention is not required simply because regulations are challenged and invalidated, in part, on the ground of vagueness.*

Appellants leap from the fact that the mail regulations were found to be defective because they are, *inter alia*, unconstitutionally vague, to the conclusion that the district court was required to abstain until the regulations had been authoritatively construed by a state court. This simplistic assertion directly conflicts with this Court's decisions in *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Keyishian v. Board of Regents*, 385 U.S. 589, 601, n.9 (1967); *Dombrowski v. Pfister*, 380 U.S. 479, 489-490 (1965); and *Zwickler v. Koota*, 389 U.S. 241, 252

[8] In the district court appellants did make one very short and half-hearted statement that the court should abstain. But the statement was no more than a generality in the course of argument on the merits that plaintiffs had not stated a claim. (See defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss, p. 10 (dated Sept. 8, 1972).) Neither of the specific grounds for abstention urged here was ever presented to the court.

(1967). In all these cases the Court held that abstention was inappropriate even though the state provisions were challenged and struck down as impermissibly vague or overbroad. As Mr. Justice White carefully explained in *Baggett v. Bullitt*, *supra*, a case involving provisions held "unduly vague, uncertain and broad" (377 U.S. at 366), the "abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law . . ." *Id.* at 375. Abstention may be appropriate when "the unsettled issue of state law principally concern[s] the *applicability* of the challenged statute to a *certain person* or a *defined course of conduct*, whose resolution in a particular manner would eliminate the constitutional issue and terminate the litigation" (*Id.* at 376-377) (emphasis added). But when the uncertain issue is not a "choice between one or several meanings of a state statute" but among an "indefinite" number of interpretations, and the question is not coverage of "certain definable activities" but rather the complaint is that those affected "cannot understand" the provisions, "cannot define the range of activities in which they might engage in the future, and do not want to forswear doing all that is literally or arguably within the purview of the vague terms", abstention should not be ordered. *Id.* at 377-78. Here, as in *Baggett*, "in light of the vagueness challenge," it is highly unlikely that any State interpretation would avoid or significantly alter the constitutional issue and, with the delay inherent in repairing to the state courts for perhaps repeated interpretations of the vague regulations, abstention would be "a result quite costly where the vagueness . . . may inhibit the exercise of First Amendment freedoms." *Id.* at 379.

In the case at bar there is no unsettled issue concerning the applicability of the regulations to appellees or to their communications by mail, "whose resolu-

tion in a particular manner would eliminate the constitutional issue . . ." Here, as in *Baggett*, the choice is among an "indefinite" number of interpretations and the challenge is that the persons affected "cannot understand" what is prohibited by the regulations and "cannot define the range" of expression which may be "literally or arguably within the purview of the vague terms." Thus, for example, the prisoners cannot know what will be prohibited as "unduly complaining" or "magnifying grievances," or "otherwise inappropriate."

Appellants have suggested no possible construction of the regulations that would cure their vagueness. Indeed, appellant Procunier's testimony (A. 50-52), approving completely open-ended interpretations of the rules, actually compounds their vagueness. Since he is the State official charged with both promulgating and enforcing the rules and "entrusted with the definitive interpretation of the language of the Rule," there is no reason not to accept his constuction of the meaning. See *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 161 (1971). As the Court said in *Broadrick v. Oklahoma*, ___ U.S. ___, 41 U.S.L.W. 5111, 5116 (1973), "Surely a court cannot be expected to ignore these authoritative pronouncements in determining the breadth" of the rules. There is no doubt that the district court in this case correctly interpreted the rules and their intent as conferring completely unchecked censorship power.

Furthermore, the challenge here is not limited to vagueness. The court below also held that the regulations were overbroad because they actually outlawed protected speech (e.g., criticism of correctional policies), and that they lacked essential procedural safeguards against denial of valid expression through error or arbitrariness. 354 F.Supp. at 1097. Appellants have suggested no construction of the regulations that could conceivably have eliminated these defects.

2. *Penal Code §2600(4) is not fairly subject to a construction that would avoid or modify the constitutional question.*

Appellants' contention that some construction of California Penal Code §2600(4) by a state court might have avoided or modified the federal constitutional question is frivolous. Appellants have not suggested any such construction. The statute cannot conceivably be interpreted to govern the issues in this case, and no one, least of all the California Attorney General, has ever before had the temerity to say that it might provide a remedy for prisoners in a case like this one. By its own terms, §2600(4) deals only with the receipt by prisoners of "newspapers, periodicals, and books", and a provision authorizes officials to exclude "publications or writings and mail containing information concerning where, how, or from whom *such matter* may be obtained . . ." (emphasis added). In short, the only mail covered by the statute concerns solicitations for obscene publications or writings; no provision purports to regulate general correspondence.[9]

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[9] In contrast, subsection (2) of §2600 expressly provides for confidential attorney mail. While this issue was raised as a constitutional matter in the prisoners' complaint, we recognized that the statute could be construed to govern this issue and accordingly advised the district court that it should abstain until the California Supreme Court decided a case then pending before it (Memorandum filed July 6, 1972, p. 14). In fact, the California court did decide that this provision of §2600 means what it says. See *In re Jordan*, 7 Cal.3d 930, 500 P.2d 873 (1972).

As to general correspondence, the only remotely relevant California state court decision assumes that prison officials have unrestricted censorship powers. See *Yarish v. Nelson*, 27 Cal. App.3d 893, 898, 104 Cal. Rptr. 205 (1972).

That § 2600(4) was never intended to deal with general mail censorship is made clear by recent legislative history. In 1972, a bill was introduced specifically to amend § 2600 to grant limited freedom from mail censorship (Senate Bill 1419). The bill passed the Legislature but was vetoed by Governor Reagan. The bill would have added an entirely new subsection to § 2600, granting prisoners a right to correspond essentially without limitation and subject to inspection only to search for contraband or to prevent commission of a crime.[10]

Until now, no one has ever suggested that § 2600(4) had anything whatever to do with general mail censorship, and it is absurd to assert that the statute could dispose of the issues in this case. It is well settled that because of the duplication of effort and expense and attendant delay, abstention is appropriate only in narrowly limited special circumstances where a state statute might reasonably be construed to avoid or modify the federal constitutional question. See *Lindsey v. Normet*, 405 U.S. 56, 62, n.5 (1972); *Lake Carriers' Association v. MacMullan*, 406 U.S. 498, 510-11 (1972). Such a construction must be a reasonably possible one, not a strained and fanciful one. "[I]f a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it." *Zwickler v. Koota*, 389 U.S. 241, 251 (1967), quoting from *United States v. Livingston*, 179 F.Supp. 9, 12-13, aff'd, 364 U.S. 281; see also *Harman v. Forssenius*, 380 U.S. 528, 534-535 (1965); compare *Reetz v. Bozanich*, 397 U.S. 82, 86-87 (1970) (case could

[10] The bill was attached as an Appendix to our Motion to Affirm or Dismiss previously filed in this Court.

clearly be decided on applicable and specific state constitutional provisions).

It makes no difference that this case involves a state correctional agency as opposed to some other state agency. The courts have uniformly found no basis for abstaining solely because the defendants were state prison officials.[11] Appellants' reliance on *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827 (1973), is misplaced. That case had nothing to do with abstention. The Court in *Rodriguez* was faced with reconciling two federal statutes, the federal habeas statute, which required exhaustion of state remedies, and 42 U.S.C. §1983, which did not. The Court held that if a prisoner is challenging "the very fact or duration of confinement" and is seeking "immediate or more speedy release," habeas corpus is the exclusive remedy. The Court distinguished prior prisoner cases that did not require resort to state courts, *Wilwording v. Swenson*, 404 U.S. 249 (1972), *Haines v. Kerner*, 404 U.S. 519 (1972), *Houghton v. Shafer*, 392 U.S. 639

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[11] See, e.g., *Shelton v. Union County Board of Commissioners*, ___ F.2d ___, No. 71-151 (7th Cir. Aug. 7, 1973); *Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972); *Lewis v. Kugler*, 446 F.2d 1343 (3d Cir. 1971); *Wright v. McMann*, 387 F.2d 519, 524-525 (2d Cir. 1967); *Rivers v. Royster*, 360 F.2d 592 (4th Cir. 1966); *Pierce v. LaVallee*, 293 F.2d 233, 235-236 (2d Cir. 1961) (cited with approval in *Cooper v. Pate*, 378 U.S. 546 (1964); *Clutchette v. Procunier*, 328 F.Supp. 767 (N.D. Cal. 1971); *Carothers v. Follette*, 314 F.Supp. 1014 (S.D. N.Y. 1970). Judge Kaufman remarked in *Wright v. McMann, supra*, that "cases involving vital questions of civil rights are the least likely candidates for abstention." 387 F.2d at 525. And Judge Mansfield in *Carothers v. Follette, supra*, pointed out that since, as here, the only basis for deciding the case was on federal constitutional grounds, "To abstain, therefore, would merely be to postpone the inevitable." 314 F.Supp. at 1019.

(1968), and *Cooper v. Pate*, 378 U.S. 546 (1964), on the ground that (as in the present case) "none of the state prisoners in those cases was challenging the fact or duration of his physical confinement itself, and none was seeking immediate or more speedy release from that confinement–the heart of habeas corpus." 93 S.Ct. at 1840. The Court also recognized that there are many civil rights cases in which the states have strong interests, yet initial resort to state courts is not required because no specific federal statute, like the habeas statute, requires going first to the state courts. 93 S.Ct. at 1838, n.10. See *McNeese v. Board of Education*, 373 U.S. 668 (1963) (school segregation);[12] *Damico v. California*, 389 U.S. 416 (1967) (welfare problems); *Monroe v. Pape*, 365 U.S. 167 (1961) (police practices).

3. *There is no clearly available comparable state remedy*

Finally, appellants recognize that "the availability of a readily accessible and meaningful state remedy is a prerequisite to the application of the doctrine of abstention" (Appellants' Brief, p. 7, n.2). They assert that California provides such a remedy but, in fact, the availability of an adequate remedy is not at all clear. The state has a "civil death" statute (Penal Code §2600) that apparently disables prisoners from maintaining actions,

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[12]In *McNeese*, 373 U.S. at 674, the Court quoted with approval from *Stapleton v. Mitchell*, 60 F.Supp. 51, 55 (D. Kan. 1945):

> "We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum."

like the present one, for injunctive relief. The only recognized remedy for California prisoners is habeas corpus. While habeas can be used to strike down plainly invalid regulations, see *In re Jordan*, 7 Cal.3d 930, 500 P.2d 873 (1972), appellants have cited no authority indicating that the kind of injunctive relief granted by the district court here—requiring the submission of new regulations that protect the interests of all parties—would be available in California habeas. Further, there are real doubts as to the practical efficacity of the habeas remedy in California. See generally Bergesen, *California Prisoners: Rights Without Remedies*, 25 Stan. L. Rev. 1 (1973).[13] In short, remitting appellees to the state courts would have caused delay, expense and the probable frustration of finding that no comparable remedy was available—all with no likelihood that the vague regulations could be authoritatively construed to eliminate the constitutional questions.

B. Abstention Should Not Be Ordered Now

Even if abstention would have been appropriate as an initial matter in the district court, assuming the proper

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[13] As one example, there is no clear or adequate provision for pretrial discovery in California habeas, and in fact discovery of the most relevant matters has been denied by the California courts. See Bergesen, *supra*, at 21-22, n. 159; 27-28. But in the present case appellees could not have proved their case without the discovery authorized by the Federal Rules of Civil Procedure. As another example, there is no provision for maintaining a class action in California habeas, but this case was properly brought to obtain class relief under Rule 23 of the Federal Rules. Finally, there has apparently never been a reported case in which a prisoner has prevailed when the facts were in dispute, for the California courts use procedures that virtually guarantee finding the facts against the prisoner. See generally Bergesen, *supra*.

grounds had been timely raised by appellants, it would be pointless to order the court below to "stay its hand" now. As all this Court's abstention cases indicate, the purpose of the doctrine is to avoid the needless confrontation of the state and federal systems. The doctrine is designed to avoid premature federal proceedings—with pleadings, responses by state officials, discovery, hearings on the merits and federal court orders running against state officials. But all this has already happened in the present case. Everything that abstention is designed to postpone has already occurred here—and it occurred without appellants' having urged the grounds for abstention they do in this Court. Moreover, appellants have not complained, either in the district court or in this Court, that any of the new regulations submitted by appellants and approved by the court below do not protect any of their legitimate interests. In these circumstances, when it is impossible to undo everything that has been done without appellants' objection, it would make no sense to order abstention now.

II.

THE DISTRICT COURT PROPERLY INVALIDATED APPELLANTS' FORMER MAIL CENSORSHIP REGULATIONS, AND THE NEW REGULATIONS APPROVED BY THE COURT BELOW FULLY PROTECT EVERY LEGITIMATE INTEREST OF APPELLANTS.

There is no contention in this case that prison officials may not inspect and read prisoner mail; that is not an issue the Court must here resolve. Nor is there any contention that officials may not censor the content of mail to protect prison security. The question is whether there are any limits to their censorship power. The issue

concerns the constitutionality of regulations under which prison guards censor and punish prisoners for the content of their communications—the *words* they use. As will be seen, *infra*, however, the only real controversy in corrections today is *whether* officials should inspect and read mail at all, not what contents should be regulated.

In order to understand precisely what is at issue on this appeal, it is necessary to compare the regulations invalidated by the court below with the regulations given final approval by the court on July 20, 1973 (Supp. A. 194-203). The difference between the former rules and the approved rules constitutes what the court below decided. Comparison of the rules shows that the net effect of the proceedings below was to invalidate the former rules prohibiting prisoners from writing letters in which they "unduly complain," or "magnify grievances" or express "inflammatory political, racial, religious or other views or beliefs," or which are "defamatory" or "are otherwise inappropriate." Except for these provisions, the substance of the former rules survived scrutiny and is contained in the rules given final approval by the court below. Therefore, the question for review here is whether the court below properly invalidated these provisions.[14]

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[14] Appellants' Brief (pp. 21-22) makes a number of misleading references to regulations that are not at issue here. Thus, the rules prohibiting letters concerning "criminal activity," or "obscene letters," were neither challenged by appellees nor struck down by the court below. The same is true of the ban on "foreign matter" and "display or circulation" of "contraband" when "used to subvert prison discipline." Further, the prohibitions of "escape plans" or plans for producing "explosives," or "behavior which might lead to violence" were neither attacked by appellees nor invalidated by the district court.

The premise of these provisions was that communication by mail is a "privilege," not a "right," which may be granted or withheld in the discretion of prison officials (A. 48,64). We believe this is a faulty premise, for it is clear that the right to communicate by mail is not only guaranteed by the First Amendment, see *Blount v. Rizzi*, 400 U.S. 410, 416 (1971); *Lamont v. Postmaster General*, 381 U.S. 301, 305 (1965),[15] but is not lost simply by virtue of imprisonment.[16] In any event, the "right-privilege" distinction has been definitively rejected as an analytic tool in deciding questions of important freedoms.[17]

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[15] The unanimous decisions in *Blount* and *Lamont* both quoted with approval Mr. Justice Holmes' view that "the use of the mails is almost as much a part of free speech as the right to use our tongues." *Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. 407, 437 (1921). See also the opinion of Mr. Justice Brandeis, rejecting the view that use of the mails is merely a privilege and not a right. 255 U.S. at 427.

[16] See, e.g., *Gray v. Creamer*, 465 F.2d 179, 186 (3d Cir. 1972); *Nolan v. Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971); *Adams v. Carlson*, 352 F.Supp. 882, 896 (E.D. Ill. 1973); *Palmigiano v. Travisono*, 314 F.Supp. 776 (D. R.I. 1970); *Carothers v. Follette*, 314 F.Supp. 1014, 1023 (S.D. N.Y. 1970); *State ex rel. Thomas v. State of Wisconsin*, 55 Wis.2d 343, 198 N.W.2d 675 (1972); *cf. Neal v. State of Georgia*, 469 F.2d 446, 450 (5th Cir. 1972); see generally Note, *Prison Mail Censorship and the First Amendment*, 81 Yale L. J. 87 (1971); Stern, *Prison Mail Censorship: A Non-Constitutional Analysis*, 23 Hastings L. J. 995 (1972); Singer, *Censorship of Prisoners' Mail and the Constitution*, 56 A.B.A. J. 1051 (1970). Indeed, even appellants profess to recognize the value, from a corrections viewpoint, of relatively free prisoner mail (A. 65–Policy Regarding Mail; Appellants' Brief, p. 23, n. 7).

[17] See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 481-482 (1972); *Graham v. Richardson*, 403 U.S. 365, 374 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); *Landman v. Royster*, 333 F.Supp. 621, 644-645 (E.D. Va. 1971); *Clutchette v. Procunier*, 328 F.Supp. 767, 779 (N.D. Cal. 1971); *Gilmore v. Lynch*, 319 F.Supp. 105, 108 (N.D. Cal. 1970), *aff'd sub nom. Younger v. Gilmore*, 404 U.S. 15 (1971).

Appellants concede, as they must, that "a prisoner does not shed all his First Amendment rights at the prison gates" (Appellants' Brief, p. 15).[18] But instead of explaining the extent to which prisoners' First Amendment rights must be curtailed because of legitimate penal interests, appellants simply cite the famous dictum from *Price v. Johnston*, 334 U.S. 266, 285 (1948): "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."[19] This begs the question, which is *what* withdrawals or limitations *are* "necessary" because of *what* penal "considerations." Similarly, the "test" proposed by appellants—whether the regulation "lacks support in any rational and constitutionally acceptable concept of a

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[18] See *Cruz v. Beto*, 405 U.S. 319 (1972); *Cooper v. Pate*, 378 U.S. 546 (1964); *O'Malley v. Brierley*, 477 F.2d 785 (3d Cir. 1973); *Remmers v. Brewer*, 475 F.2d 52, 54 (8th Cir. 1973); *Gray v. Creamer*, 465 F.2d 179, 186 (3d Cir. 1972); *Nolan v. Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971); *Barnett v. Rodgers*, 410 F.2d 995, 1000 (D.C. Cir. 1969); *Jackson v. Godwin*, 400 F.2d 529, 541 (5th Cir. 1968); *Rowland v. Sigler*, 327 F.Supp. 821 (D. Neb. 1971), *aff'd* 452 F.2d 1005 (8th Cir. 1971); *Fortune Society v. McGinnis*, 319 F.Supp. 901 (S.D. N.Y. 1970); *Palmigiano v. Travisono*, 317 F.Supp. 776 (D. R.I. 1970); *Carothers v. Follette*, 314 F.Supp. 1014, 1023 (S.D. N.Y. 1970); *Hillery v. Procunier*, ___ F.Supp. ___, No. C-71 2150 SW (N.D. Cal. Aug. 16, 1973) (3-judge court); *State ex rel. Thomas v. State of Wisconsin*, 55 Wis.2d 343, 198 N.W.2d 675 (1972).

[19] *Price* had absolutely nothing to do with the rights of prisoners vis-a-vis prison officials. The case actually held that a federal court of appeals has power to order a prisoner brought before the court to argue his own appeal. 334 U.S. at 278, 284. The decision sheds no light on the appropriate standards of judicial review of prison regulations.

prison system"—also begs the question of what is "constitutionally acceptable."

The district court assumed that prisoners' First Amendment rights exist only to the extent that their exercise is consistent with legitimate penal interests. But the record here shows that the censorship rules were not in fact needed to serve any legitimate interest. The court below found that they are not "reasonable and necessary" to serve any such interest, that they are "without any apparent justification" or any "conceivable justification on the grounds of prison security" and that they "would not appear necessary to further *any* of these functions [of prisons in America]." 354 F.Supp. at 1096 (emphasis by the court).

We recognize that First Amendment rights may have legitimate limits in the prison context. As Mr. Justice Powell has explained, "First Amendment rights must always be applied 'in light of the special characteristics of the . . . environment' in the particular case." *Healy v. James*, 408 U.S. 169, 180 (1972); see also *Tinker v. Des Moines School District*, 393 U.S. 503, 506 (1969). Keeping the prison environment in mind, and giving due deference to legitimate penal interests, we submit that the mail censorship provisions involved here are invalid under familiar principles: (1) they are overbroad in that they prohibit lawful and protected expression; (2) they are unduly vague, with the result that standardless and selective enforcement against unpopular causes and prisoners is encouraged; (3) they fail to give fair notice of punishable conduct; and (4) they lack essential procedural safeguards against denial of First Amendment rights through error or arbitrariness.

1. *Overbreadth and Prohibition of Lawful Expression*

The rules invalidated by the district court are not "narrowly drawn" regulations representing "a considered legislative judgment" that particular expression "has to give way to other compelling needs of society." See *Broadrick v. Oklahoma*, ____ U.S. ____, 41 U.S.L.W. 5111, 5114 (1973). The rules do not provide the necessary "sensitive tools" to carry out the "separation of legitimate from illegitimate speech." See *Blount v. Rizzi*, 400 U.S. 410, 417 (1971); *Speiser v. Randall*, 357 U.S. 513, 525 (1958). They disregard the established principle that "government may regulate in the [First Amendment] area only with narrow specificity" and that "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." See *NAACP v. Button*, 371 U.S. 415, 433, 438 (1963); *Keyishian v. Board of Regents*, 385 U.S. 589, 603-604 (1967); *United States v. Robel*, 389 U.S. 259, 265 (1967); see generally *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (summary of overbreadth principles and precedents of this Court). They are "overbroad" in that they "sweep unnecessarily broadly and thereby invade the area of protected freedoms." See *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964) (Harlan, J.); see also *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969); *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940); *Grayned v. City of Rockford, supra*, 408 U.S. at 114 ("in its reach it prohibits constitutionally protected conduct"); *United States v. Robel, supra*, 389 U.S. at 266.

In short, the rules do not narrowly proscribe only expression that falls outside the ambit of the First Amendment. They prohibit a broad range of expression that is clearly entitled to First Amendment protection.

We are not dealing here with obscenity or libel or "fighting words." We are dealing with thoughts expressed in prisoner mail to relatives or friends–mainly outgoing letters, not matters circulated within the walls–that the prison censor disapproves as "unduly complaining," "magnifying grievances" or "otherwise inappropriate."

As one example of the overbroad sweep of these provisions, a principal use of the rules has been to suppress criticism of prison guards and their policies (regardless of whether such criticism is valid). At Folsom Prison officials bluntly announce that letters "criticizing policy, rules or officials" violate the rules, and appellant Procunier testified that rejecting letters for this reason is authorized by the rules (A. 50-52). Letters are rejected for "belittling" staff or "the judicial system" or, indeed, "anything connected with the Department of Corrections" (A. 75). Further, letters "magnify grievances" within the meaning of the rule if they are "belittling the staff because of their incompetency" (*Id.*). Letters may also be rejected for containing "misinformation" or "prison gossip," for being "derogatory to any individuals" or "militant" or merely "inappropriate" (A. 91,92,81-86 and exhibits 1-8 to Morphis dep.). What the censoring guards consider "prison gossip" or "inappropriate" could well be a prisoner's complaint of mistreatment or his fears thereof. As the court below found, the rules can be and are used to suppress prisoner grievances, and this obviously conflicts with the First Amendment rights of expression and to petition for redress of grievances.

This Court has frequently recognized that the First Amendment protects criticism of public officials, even when untrue. See, e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Pickering v. Board of Education*, 391 U.S. 353, 570 (1968); *Near v. Minnesota*, 283 U.S. 697,

710 (1931).[20] Here, the rules prohibit such criticism regardless of its truth. This has unfortunately been common in prison mail censorship, but now the lower courts have resoundingly condemned the suppression of prisoners' complaints about official conduct or policies. See *Nolan v. Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971); *Sostre v. McGinnis*, 442 F.2d 178, 201 (2d Cir. 1971); *Worley v. Bounds*, 355 F.Supp. 115 (W.D. N.C. 1973); *Adams v. Carlson*, 352 F.Supp. 882, 896 (E.D. Ill. 1973); *Fortune Society v. McGinnis*, 319 F.Supp. 901 (S.D. N.Y. 1970);[21] *Palmigiano v. Travisono*, 317 F.Supp. 776, 788 (D. R.I. 1970);[22] *Carothers v. Follette*, 314 F.Supp. 1014 (S.D. N.Y. 1970); *State ex rel. Thomas v. State of Wisconsin*, 55 Wis.2d 343, 198 N.W.2d 675 (1972) (holding that "letters critical of prison administration

[20] In *Near* the Court struck down a statute authorizing injunctions against publishing a "defamatory" newspaper, pointing out that the "previous restraint" was imposed even without proof of the falsity of charges "against public officers of corruption, malfeasance in office, or serious neglect of duty." 283 U.S. at 710. The rules in the instant case similarly prohibit the writing of "defamatory" letters criticizing public officials, regardless of the truth of the criticism.

[21] In *Fortune Society* the court said:

> "Censorship is utterly foreign to our way of life; it smacks of dictatorship. Correctional and prison authorities, no less than the courts, are not above criticism, and certainly they possess no power of censorship simply because they have the power of prison discipline." 319 F.Supp. at 905.

[22] In *Palmigiano* the court enjoined even *reading* prisoner mail because the censorship power was wrongfully being used "to suppress any criticism of the institution or institutional officials." While *Palmigiano* involved prisoners awaiting trial, the officials subsequently entered into a consent decree enjoining all censorship of mail for all prisoners. See *Morris v. Affleck*, No. 4192 (D. R.I. April 20, 1972).

cannot be forbidden because they cause embarrassment or inconvenience to prison authorities"). Thus, the rules prohibiting letters that "unduly complain," "magnify grievances" or that are "defamatory," to the extent they are not unconstitutionally vague (see section 2, *infra*), are overbroad and ban lawful expression.

Another example of overbreadth is the prohibition of "inflammatory political, racial, religious, or other beliefs."[23] It must be remembered that no limiting standards are given to mailroom staff to guide them in deciding whether a letter violates any particular rule. This rule thus bans any "view or belief" that the censor considers, in his unguided discretion, to be "inflammatory." It must also be remembered that we are not dealing with public demonstrations or speeches or communications to be circulated within the prison walls; we are dealing with letters from prisoners to relatives and friends outside the prison. We are unable to understand how such letters could reasonably be called "inflammatory"—except to the censoring guard who finds the views or beliefs distasteful. Even expression that might legitimately be suppressed *inside* the walls cannot be censored from

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[23] This is interpreted to ban "derogatory remarks," "offensive language," material that is "discriminatory or derogatory toward any individuals or races," etc. Letters may also be placed in a prisoner's file if they "reveal an inappropriate attitude toward prison staff or society or express radical political views" (A. 21, 29–Admission 7).

The prohibition of "inflammatory . . . views or beliefs" is contained in the general definition of "contraband" and covers letters "when not in the immediate possession of the originator" (see Rule 1205(d) in Exhibit C to Appellants' Brief, and A. 19, 28–Admission 1). This apparently covers not only all incoming mail but also all outgoing prisoners' letters when put in the mail box.

outgoing letters because it obviously would not cause disruption within the prison. By definition, outgoing expression of "views or beliefs" is not "directed to inciting or producing imminent lawless action" and is not "likely to produce such action." *Cf. Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Any regulation that fails to distinguish between abstract advocacy of unpopular ideas and incitement to action is invalid as overbroad because "it sweeps within its condemnation speech which our Constitution has immunized from governmental control." *Id.* at 448. Lower courts have applied essentially the same principle in prisoner mail cases and have held that officials cannot impose punishment for the contents of letters unless they can show a real danger to prison security.[24] In *Sostre v. McGinnis*, 442 F.2d 178, 202 (2d Cir. 1971), *cert. denied sub nom. Sostre v. Oswald*, 404 U.S. 1049 (1971), the court held that a prisoner could not be punished because of his own writings even though the warden (not just a mailroom guard) considered the views "inflammatory," "racist" and insulting. The *Sostre* court, *en banc*, said that sanctioning punishment "would permit prison authorities to manipulate and crush thoughts under the guise of regulation. The intimidating threat of future similar punishment would chill a wide range of prisoner expression, not limited to that expression which [the warden]

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[24] See *Guajardo v. McAdams*, 349 F.Supp. 211 (S.D. Tex. 1972), en banc hearing ordered, 476 F.2d 1285 (5th Cir. 1973); *Palmigiano v. Travisono*, 317 F.Supp. 776 (D. R.I. 1970); *Carothers v. Follette*, 314 F.Supp. 1014, 1025 (S.D. N.Y. 1970); *cf. Goodwin v. Oswald*, 462 F.2d 1237, 1244 (2d Cir. 1972); *Nolan v. Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971); *Long v. Parker*, 390 F.2d 816, 822 (3d Cir. 1968); *Brenneman v. Madigan*, 343 F.Supp. 128, 141-142 (N.D. Cal. 1972).

might in fact deem dangerous enough to discipline." 442 F.2d at 202.

In short, the rules involved here, conferring an unchecked censorship power,[25] prohibit a wide range of expression that the state has no right to prohibit. But that is only one of their defects.

2. *Vagueness*

The rules not only, by their own terms, sweep lawful expression within their prohibition; they also suffer from the other vices of overly vague speech regulation. Thus, they discourage legitimate expression because prisoners who wish to obey the rules cannot know what is permitted as opposed to what may be punished. When does a complaint become "unduly complaining"? At what point does stating a grievance become "magnifying grievances"? Will criticism of the prison cook and the food he prepares be considered "defamatory" as "belittling the staff because of their incompetency"? To which mailroom guard will a "political . . . or other view or belief" seem "inflammatory"? How can anyone possibly know what will be considered "otherwise inappropriate"?

These rules are "unduly vague, uncertain and broad" because, *inter alia*, they provide no "ascertainable standard of conduct." *Baggett v. Bullitt*, 377 U.S. 360, 366, 372 (1964). "Standards of permissible statutory vague-

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[25] In the Court's recent and unanimous decision in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), the Court remarked that

> "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . The essence of this forbidden censorship is content control." 408 U.S. at 95, 96.

See also *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970), and authorities cited.

ness are strict in the area of free expression." *NAACP v. Button*, 371 U.S. 415, 432 (1963); *Smith v. California*, 361 U.S. 147, 151 (1959). The Court recently explained the basic principles in *Grayned v. City of Rockford*, 408 U.S. 104 (1972):

> "First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning [citations omitted; see section 3, *infra*]. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them [citations omitted]. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application [citations omitted]. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms' [citation omitted], it 'operates to inhibit the exercise of [those] freedoms' [citation omitted]. Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.' [citations omitted]." 408 U.S. at 108-109.

In the present case both the terms of the rules and the means of enforcing them are so imprecise and uncertain that prisoners who do not wish to risk guessing at what will be prohibited are deterred from expressing their true views. "When one must guess at what conduct or utterance" will be punished, "one will 'steer far wider of the unlawful zone . . .' " *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967), quoting from *Speiser v.*

Randall, 357 U.S. 513, 526 (1958); see also *Grayned v. City of Rockford, supra*, 408 U.S. at 109; *Baggett v. Bullitt*, 377 U.S. 360, 367 (1964) ("men of common intelligence must necessarily guess at its meaning and differ as to its application").

A further danger in the vagueness of the rules is that they "grant such standardless discretion to public officials that they are free to censor ideas and enforce their own personal preferences." *Grayned v. City of Rockford, supra*, 408 U.S. at 113, n. 22; see also *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969) (requiring "narrow, objective, and definite standards to guide the licensing authority"); *Cox v. Louisiana*, 379 U.S. 536, 557-558 (1965). Here, the rules delegate "standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights." *Cf. Broadrick v. Oklahoma*, ___U.S. ___, 41 U.S.L.W. 5111, 5115 (1973).[26] It must also be remembered that unlike the cases cited above, the "functionaries" here are not judges, juries or elected public officials; here the arbiter of First Amendment expression is the prison mailroom guard, perhaps not the safest repository of absolute power.[27]

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[26] Unlike the situation in *Broadrick* and *United States Civil Service Commission v. National Association of Letter Carriers*, ___ U.S. ___, 41 U.S.L.W. 5122, 5130 (1973), where more specific administrative regulations narrowed the scope of arguably vague statutes, in the present case there are no narrowing standards at all and, indeed, appellant Procunier's testimony (A. 50-52) approving open-ended interpretations of the rules actually expands and compounds their vagueness.

[27] "Acton's classic proverb about the corrupting influence of absolute power is true of prison guards no less than of other men." *Landman v. Peyton*, 370 F.2d 135, 140 (4th Cir. 1966) (Sobeloff, J.).

A related consideration is that the vagueness of the rules "lends itself to selective enforcement against unpopular causes." *NAACP v. Button*, 371 U.S. 415 435 (1963); see also *Grayned v. City of Rockford, supra*, 408 U.S. at 108-109. The rules furnish prison censors with "a convenient tool for 'harsh and discriminatory enforcement . . . against particular groups deemed to merit their displeasure.' " *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972); *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940). Since the censor is "adrift upon a boundless sea" in approving various views, there is an "inevitable tendency to ban the expression of unpopular sentiments." See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 504-505 (1952). Indeed, as the record here shows, the censoring guards have used the broad rules against what must be, for them, the most unpopular cause of all—prison reform. Thus, the rules against letters that "unduly complain" or "magnify grievances" or are "defamatory" or "otherwise inappropriate" have been used principally to suppress criticism of officials and prison policy. The vagueness of the rules makes it a practical impossibility to enforce them evenhandedly, "resulting in virtually unreviewable prior restraints on First Amendment rights." *Cf. Broadrick v. Oklahoma, supra*, 41 U.S.L.W. at 5115.

3. *No Fair Notice of Punishable Conduct*

Violation of the mail rules can result in a disciplinary report and severe disciplinary punishment up to and including confinement in segregation.[28] But they author-

[28] Appellants complain in their Brief (pp. 22-23) of the district court's failure to distinguish the consequences of violation of the rules, stating that "considerations which might justify rejection of a letter might well not justify the taking of disciplinary action." It

ize punishment without giving fair notice of what is prohibited, and this violates due process of law. See *Grayned v. City of Rockford, supra,* 408 U.S. at 108-109; *Papachristou v. City of Jacksonville, supra; Baggett v. Bullitt, supra,* 377 U.S. at 367; *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); *Landman v. Royster*, 333 F.Supp. 621, 654-656 (E.D. Va. 1971).[29] There is no possible way for a prisoner to know when a guard may consider his letter to "unduly complain," or as too critical or as "otherwise inappropriate," etc. Forcing prisoners to "guess at the meaning" of these vague rules, on pain of severe disciplinary punishment, cannot be squared with due process. See *Landman v. Royster, supra; cf. Keyishian v. Board of Regents, supra,* 385 U.S. at 604; *Baggett v. Bullitt, supra.*

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is true that the availability of "less drastic means" to serve a state interest may indicate the invalidity of a regulation, *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); see also *Police Department of Chicago v. Mosley*, 408 U.S. 92, 101, n. 8 (1972); *United States v. Robel*, 389 U.S. 258, 268 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589, 602 (1967); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307-308 (1964), and this principle has obvious application to prison censorship rules, Note, *Prison Mail Censorship and the First Amendment*, 81 Yale L.J. 87, 94-105 (1971). But it is not for the district court to specify what consequences should attend what violations of appellants' rules. The rules indiscriminately authorize punishment, or lesser consequences, for *any* violation, at the option of the censoring guard. The rules' failure to curb this absolute discretion is what the district court found invalid. In any event, the rules given final approval by the court do distinguish among consequences and thus eliminate appellants' objection (Supp. A. 198, 202-203).

[29] As cases like *Baggett* and *Landman* indicate, it makes no difference for due process purposes that the punishment is administrative and not criminal. *Cf. Morrissey v. Brewer*, 408 U.S. 471 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

4. *Absence of Procedural Safeguards*

Appellants' mail censorship rules are a classic example of a "prior restraint" on expression. This Court has declared that any system of prior restraint is presumptively invalid and bears a "heavy burden" of justification. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); see also *Healy v. James*, 408 U.S. 169, 184 (1972). Nor is there any reason why principles disfavoring prior restraints should not be applied to prison mail censorship. See generally Note, *Prison Mail Censorship and the First Amendment*, 81 Yale L.J. 87, 105-111 (1971). Even if prisoners' freedom of written expression may be limited by rejecting letters under narrowly drawn rules, censorship procedures are invalid "unless they include built-in safeguards against curtailment of constitutionally protected expression . . ." *Blount v. Rizzi*, 400 U.S. 410, 416 (1971); *cf. Freedman v. Maryland*, 380 U.S. 51 (1965); *Speiser v. Randall*, 357 U.S. 513, 521 (1958). In the prison context it would not be necessary to have judicial review, with the burden of proof on the censor; but some elementary safeguards against administrative error or arbitrariness are clearly required. Very simple procedures were prescribed by the court below, 354 F.Supp. at 1097, and by other courts in similar cases. See *Guajardo v. McAdams*, 349 F.Supp. 211 (S.D. Tex. 1972), hearing en banc ordered, 476 F.2d 1285 (5th Cir. 1973); *Sostre v. Otis*, 330 F.Supp. 941, 944-946 (S.D. N.Y. 1971); *cf. Laaman v. Hancock*, 351 F.Supp. 1265 (D. N.H. 1972); *Burnham v. Oswald*, 342 F.Supp. 880 (W.D. N.Y. 1971). In response to the decision below, appellants proposed new rules providing for notice of disapproved letters and an administrative review (Supp. A. 197-198). These were approved as satisfying the district court (Supp. A. 211-212), and appellants have

not complained either below or in this Court that the new rules leave any of their legitimate interests unprotected.

* * *

In short, the rules involved in this case violate all the applicable principles for permissible regulation of expression. In any other context they would be swiftly condemned. The question, then, is whether the district court erred in condemning them in the present case. We submit that appellants have failed utterly to suggest any valid reason why such gross departures from settled principles should be permitted here. We further submit that the regulations given final approval by the court below fully protect every legitimate interest of appellants—and appellants have not asserted the contrary.

Again keeping in mind that First Amendment principles are applied "in light of the special characteristics of the . . . environment," *Healy v. James*, 408 U.S. 169, 180 (1972); *Tinker v. Des Moines School District*, 393 U.S. 503, 506 (1969), we submit that the general principles are sufficiently flexible to deal with administrative rules of correctional agencies, just as they are with all other governmental agencies. Of course, the results in particular cases will often be different because in many prisoner cases the officials will be able to justify certain restrictions by showing that "engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation' " of the prison. *Cf. Healy, supra; Tinker, supra,* 393 U.S. at 509. But such a showing must be "factually supported by the record." *Cf. Healy, supra,* 408 U.S. at 188; *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Pickering v. Board of Education*, 391 U.S. 353, 570-573 (1968). Justification for extraordinary restrictions on the rights of individuals cannot be presumed. There must be *evidence* of likely interference with a legitimate correc-

tional interest.[30] And there must be a showing that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Cf. Healy, supra,* 408 U.S. at 189-190, n. 20; *Grayned v. City of Rockford*, 408 U.S. 104, 116-117 (1972) ("the regulation must be narrowly tailored to further the State's legitimate interest"); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 101, n. 8 (1972).[31]

Does the record in the present case support the substantial inroads on these principles claimed by appellants as "within the discretion of prison administrators"?

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[30] "In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker, supra,* 393 U.S. at 508. In *United States v. Savage,* ___ F.2d ___, No. 72-3145 (9th Cir. Aug. 8, 1973), the Ninth Circuit, relying on the district court decision in this case, held that interception of a prisoner letter was unconstitutional "absent a showing of some justifiable purpose of imprisonment or prison security."

[31] See also *United States v. O'Brien,* 391 U.S. 367, 377 (1968); *United States v. Robel,* 389 U.S. 258, 268 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589, 602, 609 (1967); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Specifically applying this principle in prisoners' rights cases, see *O'Malley v. Brierley*, 477 F.2d 785, 796 (3d Cir. 1973); *McDonnell v. Wolff*, ___ F.2d ___, No. 72-1331 (8th Cir. Aug. 2, 1973); *Goodwin v. Oswald*, 462 F.2d 1237, 1244 (2d Cir. 1972); *Barnett v. Rodgers*, 410 F.2d 995, 1000 (D.C. Cir. 1969); *Jackson v. Godwin*, 400 F.2d 529, 541 (5th Cir. 1968); *Rowland v. Sigler*, 327 F.Supp. 821 (D. Neb. 1971), *aff'd* 452 F.2d 1005 (8th Cir. 1971); *Hillery v. Procunier*, ___ F.Supp. ___, No. C-71 2150 SW (N.D. Cal. Aug. 16, 1973) (3-judge court); *State ex rel. Thomas v. State of Wisconsin*, 55 Wis.2d 343, 198 N.W.2d 675 (1972).

As the court explains in *Hillery v. Procunier, supra,* the analysis of Judge Mansfield in *Carothers v. Follette*, 314 F.Supp. 1014, 1024 (S.D. N.Y. 1970), is consistent with the above analysis: "That is, not only must the state show a compelling interest in limiting the prisoners' rights, but the *method* it chooses to effect the limitation must be related–'reasonably and necessarily'–to the end sought." (slip op. at 11; emphasis by the Court).

In this case appellants presented *no* evidence, not even their own opinions, to show any legitimate justification for the rules in question. Assuming that they had some legitimate interest, they did not show that less restrictive means would be ineffective to protect it. On this record, there is "no plausible basis" for their action. *Carothers v. Follette*, 314 F.Supp. 1014, 1024 (S.D. N.Y. 1970); accord *Worley v. Bounds*, 355 F.Supp. 115 (W.D. N.C. 1973); *Adams v. Carlson*, 352 F.Supp. 882, 896 (E.D. Ill. 1973).[32] The findings of the court below are unassailable: that the rules are not "reasonable and necessary," are "without any apparent justification" or any "conceivable justification on the grounds of prison security" and "would not appear necessary to further *any* of these functions [of prisons in America]." 354 F.Supp. at 1096 (emphasis by the court).

The record is barren of any justification for appellants' rules. Even if we look elsewhere for empirical justification for appellants' censorship rules, we can find none. All the secondary material is to the contrary. Thus, it is generally recognized that the sole purpose served by prison mail censorship is to protect the security of the institution by preventing the introduction of contraband (drugs, weapons, cash, etc.) and the formation of escape or criminal plans. See generally, California Board of

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[32] The need for prison officials to introduce *evidence* of justification, rather than rely on courts to speculate, was well explained by the Fourth Circuit:

> "[p]rison officials are not judges. They are not charged by law and constitutional mandate with the responsibility for interpreting and applying constitutional provisions, and they are not always disinterested persons in the resolution of prison problems. We do not denigrate their views but we cannot be absolutely bound by them." *Brown v. Peyton*, 437 F.2d 1228, 1232 (4th Cir. 1971).

Corrections, *California Correctional System Study: Institutions*, 40 (July, 1971) (the "Keldgord Report"). The comprehensive Keldgord Report sharply criticized appellants' mail censorship policy on practical grounds, stating that "it is senseless to do pointless things." The Report pointed out that it might make sense to inspect incoming mail for contraband, "but the practice of reading everything that goes in and out is unnecessary and wasteful, and fosters inmate resentment." *Id.* Indeed, as to "rehabilitating" prisoners, it is as likely that mail censorship impedes rehabilitation as that it furthers it. See Note, *Prison Mail Censorship and the First Amendment*, 81 Yale L.J. 87, 103 (1971), and authorities cited therein; see also Note, *The Right of Expression in Prison*, 40 S. Cal. L. Rev. 407 (1967); Singer, *Censorship of Prisoner Mail and the Constitution*, 56 A.B.A.J. 1051 (1970); Stern, *Prison Mail Censorship: A Non-Constitutional Analysis*, 23 Hastings L.J. 995 (1972). In short, *all* the commentators urge that there be no censorship of content at all. The decision below, which continues to authorize censorship, begins to appear quite conservative.

A growing number of decisions have found, on the evidence in those cases, that the prison officials have no legitimate interest in censoring outgoing mail and have enjoined such censorship. In *Guajardo v. McAdams*, 349 F.Supp. 211 (S.D. Tex. 1972), hearing en banc ordered, 476 F.2d 1285 (5th Cir. 1973), the court found that "total censorship serves no rational deterrent, rehabilitative of prison security purposes." The court therefore enjoined all censorship of outgoing mail; incoming letters could be rejected only if they contained specific enumerated contents (e.g. escape plots, codes, contraband, etc.) and if the prisoner was afforded a fair opportunity to protest any rejection. Accord, *Lamar v. Kern*, 349

F.Supp. 222 (S.D. Tex. 1972); *Gates v. Collier*, 349 F.Supp. 881, 898-899 (N.D. Miss. 1972); *Palmigiano v. Travisono*, 317 F.Supp. 776 (D. R.I. 1970).[33]

Aside from judicial inquiries, responsible correctional authorities themselves have recently examined prison mail censorship practices and have found them quite unnecessary and even counterproductive. The prestigious National Advisory Commission on Criminal Justice Standards and Goals, which is composed of the country's outstanding authorities in the field and was formed to advise the federal Law Enforcement Assistance Administration on standards in making its grants, promulgated its *Standards* in January, 1973. *Standard* 2.15, on Free Expression and Association, unequivocally rejects the views advanced by appellants' lawyers as unsound correctional practice. Specifically on mail censorship, *Standard* 2.17 flatly provides that "neither incoming nor outgoing mail should be read or censored." For the convenience of the Court, we have reproduced the pertinent excerpts from the *Standards* and their commentary in the Appendix to this brief, *infra*.

In addition, the Center for Criminal Justice of the Boston University School of Law has recently developed and published the *Model Rules and Regulations on Prisoners' Rights and Responsibilities* (1973). *Rules* IC-1 and IC-2 provide for unread and uncensored correspondence, absent exceptional circumstances. That the *Model*

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[33] In addition, many states have voluntarily abandoned all censorship. See, e.g., Michigan Department of Corrections, Departmental Directive CC-10 (Oct. 17, 1972) (reported at 2 Prison Law Rptr. 177), stating that prisoners are "permitted to send uncensored sealed letters to any person or organization." See also Washington Office of Adult Corrections, Memorandum No. 70-5 (Nov. 6, 1970); Pennsylvania Bureau of Correction, Administrative Directive No. 3 (effective Dec. 15, 1970).

Rules do not represent just an idealist's notion of prisoners' rights is illustrated by the Foreward; the Commissioner of Corrections of Massachusetts states that the Rules are "a long overdue instrument for the development of sound correctional policy," provide "a viable blueprint from which a sound correctional management system can be constructed," and are "an invaluable tool" for correctional administrators striving to build "systems that operate fairly, thoroughly, and effectively."

In other words, the only real controversy in corrections today concerns whether mail should be read at all, not what contents should be censored or punished. That is not an issue the Court must now resolve, but it surely indicates that appellants have failed to show any persuasive reasons for the overbroad, vague and restrictive rules involved in this case. Appellants have not identified any provision of the rules finally approved by the district court on July 20, 1973 (Supp. A. 194-203), that they claim does not adequately protect legitimate state interests. We submit that their interests are more than adequately protected by the approved rules; and the judgment below should be affirmed.

III.

THE DISTRICT COURT PROPERLY INVALIDATED APPELLANTS' FORMER ABSOLUTE PROHIBITION AGAINST USE BY ATTORNEYS OF LAW STUDENT OR PARALEGAL INVESTIGATORS TO INTERVIEW PRISONERS ON THEIR BEHALF, AND THE NEW REGULATION APPROVED BY THE COURT BELOW FULLY PROTECTS EVERY LEGITIMATE INTEREST OF APPELLANTS

Once again, in order to understand what is at stake on this appeal, it is necessary to compare the former rule

invalidated by the district court with the rule given final approval on July 20, 1973.[34] Only then can it be seen exactly what the court decided and what appellants have actually been ordered to do. The former rule authorized attorneys representing prisoners to use investigators for interviewing prisoners, but limited the class to state-licensed investigators and members of the State Bar—and no others. Thus, an attorney could not even send a student or assistant as a messenger to have papers signed. As appellants state (Brief, p. 24), after the decision below but before the final order, they voluntarily opened the class to include law students certified under the rules of the State Bar. This is reflected in the final order (Supp. A. 198). The only other addition to the class of the former rule consists of "legal paraprofessionals certified by the State Bar or other equivalent legal professional body and sponsored by the attorney of record" (*Id.*). At the present time there is *no* paraprofessional certification procedure by the State Bar or, so far as we are aware, by any other legal professional body in California.[35]

[34] Appellants' Brief seriously misrepresents the record and distorts the issue presented. Although their Brief was filed about a month after the district court's final order of July 20, 1973 (Supp. A. 211-212), appellants fail to mention the provisions of that order and make a number of misleading and erroneous assertions about what the court below ordered. Thus, appellants state (p. 24-25) that they were ordered to include *all* full-time legal assistants among the class of attorneys' investigators authorized to interview prisoners. In their statement of the Question Presented (p. 2), they claim the class includes "full time lay employees" of attorneys. They further state (p. 26-27) that "all law students" and "other paraprofessionals" must be accorded all "attorney's privileges." These assertions are untrue.

[35] In July 1973, the California State Bar issued a report *recommending* the adoption of a comprehensive new statute, to be entitled the "Certified Attorney Assistant Act", which would set

Accordingly, appellants are not now required to admit *any* paraprofessionals as investigators. The only law students they must admit are those receiving State Bar certification, and appellants took this step voluntarily and not by court order. Finally, it is misleading for appellants to emphasize that they were ordered to permit "confidential" communications by "non-attorneys", because the issue tried below was whether appellants may arbitrarily bar all law students and paralegal persons from acting on behalf of attorneys, not whether all such communications must be confidential.[36] In summary, the relief actually ordered by the district court is very narrow and should, under the precedents in this Court and on the record here, be affirmed.

The constitutional prohibition against depriving a person of liberty without due process of law has, as a necessary corollary, the requirement that prisoners be

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up standards for certifying legal assistants. State Bar of California, *Reports* (July, 1973). The recommendation was based on detailed investigation and a finding that "Increased use by lawyers of the services of legal assistants will be necessary in order for members of the State Bar to continue to furnish quality legal services to the public at reasonable cost." *Id.* at 2. Directly applicable to the present case was the Bar's finding that "As lawyers become more efficient and extend their abilities through the use of well-trained Certified Attorney Assistants, additional thousands of persons will receive quality legal services in situations where *they otherwise would not have received legal assistance at all.*" *Id.* at 4. (emphasis added)

[36] We assume that the attorney-client privilege of California Evidence Code §952 would cover communications between prisoners and attorneys' investigators. But appellants' rule finally approved by the court below omitted, over appellees' objection, the word "confidential", thus creating a possible ambiguity as to appellants' understanding of what they have been ordered to do (see Supp. A. 209).

afforded access to the courts to set aside convictions obtained in violation of their federal constitutional rights or to remedy invasions of their constitutional rights while incarcerated.[37] It has long been clear that this paramount right of prisoner access to the courts to present their constitutional claims invalidates prison regulations which effectively impair that right. *Ex parte Hull*, 312 U.S. 546 (1941). Not only may state officials not obstruct access to the courts, but "due process requires, at a minimum, that *absent a countervailing state interest of overriding significance*, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) (emphasis added). The Court in *Boddie*, relying on precedents established in the criminal defense context, reasoned that where the "judicial proceeding becomes the only effective means of resolving the dispute at hand . . . denial of a defendant's full access to that process raises grave problems for its legitimacy."[38]

In *Johnson v. Avery*, 393 U.S. 483 (1969), the Court recognized that effective access to the courts for many

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[37] See, e.g., *Kaufman v. United States*, 394 U.S. 217, 226 (1969); *Johnson v. Avery*, 393 U.S. 483 (1969); *Mooney v. Holohan*, 294 U.S. 703, 713 (1935); see also *McDonnell v. Wolff*, ___ F.2d ___, No. 72-1331 (8th Cir. Aug. 2, 1973); *Nolan v. Scafati*, 430 F.2d 548, 551 (1st Cir. 1970); *Landman v. Royster*, 333 F.Supp. 621, 656 (E.D. Va. 1971); *Cross v. Powers*, 328 F.Supp. 899, 901 (W.D. Wis. 1971). The Seventh Circuit's recent decision in *Adams v. Carlson*, ___ F.2d ___, 13 Cr. L. Rptr. 2532 (7th Cir. Aug. 23, 1973), contains a useful analysis of restrictions on prisoner access to the courts.

[38] *United States v. Kras*, 409 U.S. 434 (1973), does not limit the application of *Boddie* to this case, for here, like *Boddie* and unlike *Kras*, a "judicial proceeding" is "the only effective means" of challenging a prisoner's conviction or sentence or the constitutionality of his treatment while in prison.

prisoners is meaningless unless some form of legal assistance is provided. The Court emphasized that "for the indigent as well as for the affluent prisoner, post-conviction proceedings must be more than a formality." 393 U.S. at 486. The Court held that unless "the state provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief" it may not bar inmates from furnishing assistance to other inmates. Mr. Justice White, dissenting, would not have struck down the anti-prisoner assistance regulation but would have ruled in a proper case that "the state must provide access to the courts by insuring that those who cannot help themselves have reasonably adequate assistance in preparing their post-conviction papers." 393 U.S. at 502. Indeed, Mr. Justice White's opinion in *Johnson* states what is basically at stake in the instant case:

> "The illiterate or poorly educated and inexperienced indigent cannot adequately help himself and . . . unless he secures aid from some other source he is effectively denied the opportunity to present to the courts what may be valid claims for post-conviction relief." 393 U.S. at 498.

In *Younger v. Gilmore*, 404 U.S. 15 (1971), this Court affirmed a decision requiring California prisons to provide law libraries or other means of meeting the legal needs of prisoners. *Gilmore v. Lynch*, 319 F.Supp. 105 (N.D. Cal. 1970). If state officials are required to take affirmative action or adopt expensive programs to provide adequate legal resources, as in *Gilmore*, it follows, *a fortiori*, that they may not maintain regulations that arbitrarily preclude the use of available legal assistance in the representation of prisoners.

This Court's decisions in *Gilmore*, *Boddie* and *Johnson*, and the earlier decisions in *Griffin v. Illinois*, 351 U.S. 12 (1956), and *Douglas v. California*, 372 U.S. 353

(1963), teach that the states cannot deny to indigents the necessary means for obtaining a fair hearing of their possibly valid constitutional claims. The Court's decisions have recognized practical reality not merely by striking down absolute barriers to the courts but by declaring that *effective* access to the judicial process is required when fundamental interests like liberty are at stake. For example, in *Douglas*, as here, the prisoner was not totally barred from filing his appeal; and in *Johnson*, as here, he was not totally barred from filing his writ. But in both cases, as here, the state practice prevented *effective* use of the judicial process. In *Gilmore*, the State was required to take affirmative action to assure access to the courts. Jailhouse lawyers were permitted by *Johnson* because of the function they serve—as tools enabling prisoners to bring their claims before the courts. Mr. Justice White noted in *Johnson* that "unless the help the indigent gets from other inmates is reasonably adequate for the task, he will be as surely and effectively barred from the courts as if he were accorded no help at all." 393 U.S. at 499. As foreseen, the district court in the present case found that other tools are needed as well. Just as the paramount interest in making the courts fully available for the resolution of constitutional claims compelled the results in *Johnson* and *Gilmore*, it requires affirmance of the decision in the present case. Post-conviction remedies theoretically available to all in California are not in fact available if the State denies indigents available legal assistance to use them. Because the State denies the prisoner both his livelihood (e.g., to hire a lawyer or a private investigator) and his liberty (e.g., to consult a public defender or an OEO legal services attorney and their paralegal assistants), the State has erected very effective barriers to the judicial process—unless the State permits available alternative sources of legal help.

Access to the courts necessarily involves the right to seek and receive assistance from attorneys. The courts have consistently invalidated action by prison officials that impeded communication and consultation either by mail or in person.[39]

While appellants argue that their rule in this case, completely forbidding the use of law students or paralegals for interviewing, does not impair access to the courts,[40] the uncontested evidence on which the court below based its findings of fact was that the rule, in conjunction with the remoteness of most California prisons, "makes personal visits to inmate-clients so time consuming and inconvenient that attorneys are reluctant to make such visits." 354 F.Supp. at 1098. Preparation of this case was itself hindered and delayed because appellants refused to permit counsel for appellees to use supervised law students to interview their clients (Supp. A. 186). The court below concluded that the rule arbitrarily denied necessary legal assistance to indigent prisoners.

[39] See, e.g., *McDonnell v. Wolff*, ___ F.2d ___, No. 72-1331 (8th Cir. Aug. 2, 1973), *aff'g* 342 F.Supp. 616 (D. Neb. 1972); *LeVier v. Woodson*, 443 F.2d 360 (10th Cir. 1971); *Nolan v. Scafati*, 430 F.2d 548 (1st Cir. 1970); *Coleman v. Peyton*, 362 F.2d 905, 907 (4th Cir.), *cert. denied*, 385 U.S. 905 (1966); *cf. Moore v. Ciccone*, 459 F.2d 574 (8th Cir. 1972); *Smith v. Robbins*, 454 F.2d 696 (1st Cir. 1972); *Morales v. Turman*, 326 F.Supp. 677 (E.D. Tex. 1971); *Marsh v. Moore*, 325 F.Supp. 392, 395 (D. Mass. 1971); *In re Jordan*, 7 Cal.3d 930 (1972). In *Adams v. Carlson*, ___ F.2d ___, 13 Cr. L. Rptr. 2532 (7th Cir. Aug. 23, 1973), a case quite analogous to the present one, the Seventh Circuit recently struck down a prison restriction requiring attorneys to interview their clients through a screen, reasoning that the restriction unjustifiably interfered with the ease of personal interviewing.

[40] Appellants' contention that there is no right to appointed counsel in post-conviction matters completely misses the point. Indeed, as the Court recognized in *Johnson v. Avery*, 393 U.S. 483, 489, 490 (1969), the fact that state-provided attorneys are not generally available in these matters increases the need for law student, paralegal and other voluntary assistance.

As the record shows and as is obvious, attorneys simply cannot agree to represent very many prisoners, with little or no compensation, if they must take full days to journey to remote California prisons personally to interview clients or prospective clients. Denying the right to use law students or paralegal interviewers means, in many cases, the difference between the prisoner having counsel and not having counsel. "[T]he inmate's ability to present his case to the court necessarily suffers substantially from the absence of professional representation." 354 F.Supp. at 1098.

In attempting to give a prisoner effective representation, or in seeking the information required to advise him intelligently, an attorney may need the services or assistance of others. In recent years lawyers have come to rely more and more on the aid of paraprofessionals whom they have trained and who, working under their supervision, are a vital part of the legal team.

The use of paraprofessionals has received little attention from the courts, but has been encouraged by many professional organizations, including the American Bar Association. The new Code of Professional Responsibility adopted by the ABA specifically permits a lawyer to delegate tasks to lay persons:

> "A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal services more economically and efficiently." Canon 3, Ethical Consideration 3-6.

In a speech before the National Conference on the Judiciary at Williamsburg in 1971, President Nixon said that "We should open our eyes—as the medical profession

is doing—to the use of paraprofessionals in the law." N.Y.L.J., March 12, 1971, p. 4. See also Brickman, *Expansion of the Lawyering Process Through A New Delivery System: The Emergence and State of Legal Paraprofessionalism*, 71 Col. L. Rev. 1153 (1971).

If the use of paraprofessionals is merely desirable as a general matter, it is absolutely essential if prison inmates are to receive vital assistance in obtaining access to the courts. Most prisoners are indigent, and lack the funds needed to retain a lawyer or even to pay for a single interview. They are dependent on the assistance of attorneys and organizations willing and able to represent them without fee. The supply of attorneys able to serve in this capacity is obviously limited. See *Johnson v. Avery, supra,* 393 U.S. at 494; *cf. In re Tucker*, 5 Cal.3d 171, 183 (1971). Courts and commentators have recognized that providing indigent prisoners with essential legal services is a burdensome problem to the Bar, and have concurred in recommending the utilization of laymen and law students to help fill the gap. See, e.g., *Johnson v. Avery, supra,* 393 U.S. at 489, 498;[41] *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972);[42] *Novak v. Beto*, 453 F.2d 661, 664 (5th Cir. 1971) (encouraging any source of legal assistance to prisoners, "whether it be licensed or unlicensed to practice law"); *Hooks v. Wainwright*, 352 F.Supp. 163 (M.D. Fla. 1972); *Gilmore v. Lynch*, 319 F.Supp. 105, 110 (N.D. Cal. 1970), *aff'd sub nom. Younger v. Gilmore*, 404 U.S. 15 (1971); Jacob &

[41] "The cooperation and help of laymen, as well as of lawyers, is necessary if the right of '[r]easonable access to the courts' is to be available to the indigents among us." (Douglas, J., concurring).

[42] "Law students as well as practicing attorneys may provide an important source of legal representation for the indigent" (Brennan, J., concurring).

Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 Kan. L. Rev. 493 (1970).

Using law students and paralegal persons in counseling prisoners saves attorneys the considerable time that is required by personal visits to distant institutions and in waiting even at nearby prisons (Supp. A. 184-186). Following an attorney's detailed instructions, a paraprofessional assistant can obtain essential facts from the prisoner, and transmit the attorney's advice or recommendations to him.[43] Communication by mail is no substitute for personal communication, where careful questioning can elicit the essential relevant facts that few prisoners are able to present on their own.[44] Obtaining the same complete details by mail is often impossible, or requires a prolonged exchange of queries and responses. Nor does the mail permit the assessment of credibility, an essential element in any decision whether to render voluntary assistance.

The American Bar Association recognizes the value of using law student services for these purposes, stating that the lawyer

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[43] Appellants' rule permits visits by state-licensed investigators, but their services are of course unavailable to indigent inmates who cannot pay their fees. Moreover, their aid is less valuable in this context than that of the paraprofessional who works closely with the attorney, and whose training is directed toward awareness of specific legal issues.

[44] "[T]he most important part of a legal assistance plan is not the law books or library, or the availability of decisions, but the opportunity to consult with an attorney, or at least a person of good common sense and experience who can, in a straightforward and complete manner, set forth the inmate's claim in understandable fashion." *Stevenson v. Mancusi*, 325 F.Supp. 1028, 1032 (W.D. N.Y. 1971).

> ". . . may avail himself of the assistance of the law student in many of the fields of the lawyer's work, such as examination of case law finding and interviewing witnesses, . . . delivering papers, conveying important messages, and other similar matters." Canon 3, Ethical Consideration 3-6, footnote 3.

The *Rules for Practical Training of Law Students* promulgated by the California State Bar Board of Governors[45] authorize supervised law students to engage in a wide range of activities including

> "Conducting investigations and interviewing clients and witnesses for the purpose of ascertaining facts and informing the supervising lawyer thereof." Rule VII.C.

But none of these activities was permitted by appellants.

There is no dispute as to the need to utilize law students to assist California prisoners. Indeed, many law school programs authorized by appellants send substantial numbers of students into the prisons (A. 61-62). The students in such programs, however, are not closely supervised by attorneys and could not meet the standards of State Bar certification of law students (A. 113-114; A. 35-36; A. 62; Supp. A. 188). Nor do appellants make any inquiry into the students' qualifications or subject them to any security clearance (A. 62). This shows the arbitrariness of appellants' rule involved here, which allows interviews by essentially unsupervised students in school programs while flatly prohibiting interviews by law student assistants closely supervised by attorneys. The rule also arbitrarily discriminates against law students supervised by attorneys with organizations like the NAACP Legal Defense Fund or the American Civil

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[45] State Bar of California *Reports* (Feb. 1970).

Liberties Union, since such organizations often deal with problems outside the scope of the school programs—e.g., problems of prison reform such as the instant case.

Appellants' rule prohibiting interviews by paralegal assistants, especially law students, thus excludes a significant source of legal assistance to prisoners. As the California Bar found, n. 35, *supra*, and as the record here shows (A. 126-130), there is a growing supply of highly trained and academically qualified paralegal personnel. See also Larson, *Legal Paraprofessionals: Cultivation of a New Field*, 59 A.B.A.J. 631 (1973) (Minnesota program). But these persons are completely barred by appellants' rule. In view of the unmet need for legal assistance, the rule is an invalid infringement on the fundamental right of access to the courts. See *Younger v. Gilmore*, 404 U.S. 15 (1971); *Johnson v. Avery*, 393 U.S. 483 (1969); *Mead v. Parker*, 464 F.2d 1108, 1110 (9th Cir. 1972). In *Johnson v. Avery, supra,* this Court acknowledged a danger to prison discipline presented by "jailhouse lawyers" but nevertheless held invalid a regulation barring them from assisting other prisoners seeking access to the courts. 393 U.S. at 488. Surely the burden of justifying a prohibition against consulting trained and supervised assistants to lawyers should be at least as great as the burden of justifying a bar against consulting an untutored "jailhouse lawyer."[46]

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[46] The courts have uniformly held that the burden of justifying a rule impairing access to the courts rests on the prison officials, not the prisoners. See, e.g., *McDonnell v. Wolff*, ___ F.2d ___, No. 72-1331 (8th Cir. Aug. 2, 1973); *Novak v. Beto*, 453 F.2d 661, 664 (5th Cir. 1971); *Wainwright v. Coonts*, 409 F.2d 1337, 1338 (5th Cir. 1969); *Van Erman v. Schmidt*, 343 F.Supp. 337, 379 (W.D. Wis. 1972); *Cross v. Powers*, 328 F.Supp. 899, 904 (W.D. Wis. 1971).

The district court gave more than adequate deference to any legitimate interest of appellants. It accepted without scrutiny the offhand opinion of appellant Procunier (A. 63-64), that uncontrolled use of investigators created security problems by letting in "some people we chose not to have in our institutions". There was no proof of involvement of unlicensed investigators in any incidents (A. 63; A. 35-36—answer to interrogatory 7), and no showing of even a "very distant possibility of harm" arising from their admission to prisons. *Cf. United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 223 (1967). Certainly there was nothing to indicate that use of closely supervised and Bar-certified students or paraprofessionals would interfere with any legitimate interest of appellants. The final order of the district court imposes stringent safeguards on the use of paralegals (Supp. A. 198-200). The relief ordered by the Court below was the most restrained possible, and appellants have offered no reason for overturning it.

In the only other case squarely in point, *Arif v. McGrath*, No. 71-C-1388 (E.D. N.Y. Dec. 9, 1971), the court held that the New York City Department of Corrections had impaired the prisoners' right to counsel by refusing to allow them to consult with their attorney's non-admitted assistants. The court found that consultation with lay assistants was necessary to implement "the right of parties in the federal courts to conduct their case 'personally or by counsel'. 28 U.S.C. Section 1654." (slip opinion pp. 21-22). It ordered the defendants to "permit visits to the plaintiffs by law students, law school graduates or investigators authorized in writing by their attorneys" and directed them not to "monitor or eavesdrop on such visits." (slip op. p. 23).

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted,

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APPENDIX

Pertinent Excerpts from the Standards of the National Advisory Commission on Criminal Justice Standards and Goals (Jan. 1973)

STANDARD 2.15
FREE EXPRESSION AND ASSOCIATION

Each correctional agency should immediately develop policies and procedures to assure that individual offenders are able to exercise their constitutional right of free expression and association to the same extent and subject to the same limitations as the public-at-large. Regulations limiting an offender's right of expression and association should be justified by a compelling state interest requiring such limitation. Where such justification exists, the agency should adopt regulations which effectuate the state interest with as little interference with an offender's rights as possible.

* * * * *

Justification for limiting an offender's right of expression or association would include regulations necessary to maintain order, or to protect other offenders, correctional staff, or other persons from violence, or the clear threat of violence. The existence of a justification for limiting an offender's rights should be determined in light of all the circumstances including the nature of the correctional program or institution to which he is assigned.

Ordinarily, the following factors would not constitute sufficient justification for an interference with an offender's rights unless present in a situation which constituted a clear threat to personal or institutional security.

1. Protection of the correctional agency or its staff from criticism, whether or not justified.

2. Protection of other offenders from unpopular ideas.

3. Protection of offenders from views correctional officials deem not conducive to rehabilitation or other correctional treatment.

4. Administrative inconvenience.

5. Administrative cost except where unreasonable and disproportionate to that expended on other offenders for similar purposes.

Correctional authorities should encourage and facilitate the exercise of the right of expression and association by providing appropriate opportunities and facilities.

[Commentary omitted]

STANDARD 2.17
ACCESS TO THE PUBLIC

Each correctional agency should immediately develop and implement policies and procedures to fulfill the right of offenders to communicate with the public. Correctional regulations limiting such communication should be consistent with Standard 2.15. Questions of rights of access to the public arise primarily in the context of regulations affecting mail, personal visitation, and the communications media.

Mail. Offenders should have the right to communicate or correspond with persons or organizations and to send and receive letters, packages, books, periodicals, and any other material that can be lawfully mailed. The following additional guidelines should apply:

1. Correctional authorities should not limit the volume of mail to or from a person under supervision.

2. Correctional authorities should have the right to inspect incoming and outgoing mail, but *neither incoming*

nor outgoing mail should be read or censored. Cash, checks, or money orders should be removed from incoming mail and credited to offenders' accounts. If contraband is discovered in either incoming or outgoing mail, it may be removed. Only illegal items and items which threaten the security of the institution should be considered contraband.

3. Offenders should receive a reasonable postage allowance to maintain community ties. (emphasis added)

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Commentary

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Mail. In censoring and regulating mail, correctional authorities have not limited themselves to keeping out harmful or potentially dangerous objects or substances. The censorship of mail all too often has been utilized to exclude ideas deemed by the censor to be threatening or harmful to offender or critical of the correctional agency. These efforts result in the diversion of manpower from other tasks and, to avoid excessive manpower drains, limitations on the volume of correspondence permitted. Censorship and limitations on correspondence directly generate inmate hostilities and serve to make correctional progress more difficult.

Courts began to look critically at this process when it came to their attention that correctional authorities were limiting access to courts. Instances of failure to mail complaints, invasion of privileged attorney-client communications, and reprisals against inmates for attempting to send out information about deficient conditions were documented. Limitations on access to religious material also were discovered and criticized.

Contraband must be excluded from correctional institutions to preserve their security and good order by

limiting the development of inmate power groups that often results from acquisition of contraband. The standard authorizes the correctional administrator to inspect incoming and outgoing mail for contraband but not to read or censor the contents.

Correctional authorities have a duty to insure that offenders are able to correspond with members of the public. A reasonable postage allowance should be provided each offender as part of an affirmative program to help him retain community ties.